

# The Establishment Clause: Lost Soul of the First Amendment

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## I. INTRODUCTION

Constitutional guarantees, regardless of how profound, are not absolute.<sup>1</sup> The history of fundamental rights and liberties, from the first through the fourteenth amendment, is replete with instances of limitation, condition, and circumscription. Although deviation from or qualification of fundamental norms is not necessarily problematical when justifications are weighty and principled,<sup>2</sup> judicial line-drawing that is perceived as fitful, capricious, or poorly linked to pertinent values is likely to be both institutionally and constitutionally demeaning. Supreme Court review, pursuant to the first amendment's establishment clause, may not reflect the original miscalculations characterizing other constitutional ignominies such as slavery,<sup>3</sup> segregation,<sup>4</sup> and *Lochnerism*.<sup>5</sup> Still, the construction and execution of standards fail to satisfy even minimal expectations of persuasive and creditable analysis. They are dishonored in word, by critics who regard their inconsistencies as an embarrassment,<sup>6</sup> and in deed, by exponents who apply them erratically<sup>7</sup> or simply dispense with them when convenience beckons.<sup>8</sup>

The establishment clause, in theory, makes religion irrelevant to political standing and guards against directly or indirectly coerced association with religion.<sup>9</sup> Modern analysis of relationships between church and state essentially consists of a three-part test focusing upon purpose, effect, and entanglement. Government action supposedly crosses the establishment clause if not occasioned by a secular motive, if construed as officially endorsing or disparaging religion, or if the government action would ensnare the separate machinery of church and state.<sup>10</sup> The elements of this tripartite formula have bred dissonance and betrayed analytical weakness. Assessment of intent implicates the vanities of motive-based inquiry.<sup>11</sup> The focus upon

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1. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978).

2. Freedom of expression, for instance, may be curtailed or denied altogether when the Court considers regulatory interest to be significant enough. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (commercial expression may be regulated to ensure unimpaired flow of truthful information); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (political expression may be regulated if imminent unlawful conduct is likely); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity is unprotected expression).

3. See *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

4. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

5. The term "*Lochnerism*" refers to the Court's construction of contractual freedom as a fundamental liberty secured by the fourteenth amendment and unbending use of it to invalidate economic and social reforms during the first third of this century. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 438-42 (1978).

6. See *Wallace v. Jaffree*, 472 U.S. 38, 106-12 (1985) (Rehnquist, J., dissenting).

7. See *infra* notes 26-51 and accompanying text.

8. See *infra* notes 103-06 and accompanying text.

9. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

10. See *id.* at 688; *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

11. See *infra* notes 62-72 and accompanying text.

effect has engendered appraisal that too often is insensitive to or unmindful of reality.<sup>12</sup> Consideration of whether government and religion would become unduly intertwined has suffered from calculated neglect and at times has functioned surreptitiously as a balancing test.<sup>13</sup>

Given the inscrutable lessons of accumulated case law and consequent unpredictability of result, it is not surprising that some members of the Court have sought out or advanced alternative analytical methodologies. Unfortunately, what has surfaced from the intellectual morass so far is no less disquieting than prevailing doctrine. Former Chief Justice Burger devised an accommodation concept that the Court relied upon in upholding the use of chaplains to open legislative proceedings.<sup>14</sup> The principle also contributed toward validation of a government sponsored nativity scene.<sup>15</sup> Meanwhile, Chief Justice Rehnquist has challenged the foundational premise that the establishment clause creates a wall between government and religion.<sup>16</sup> He thus maintains that the Constitution requires official neutrality among religions but not between religion and irreligion.<sup>17</sup> Neither the accommodation precept nor the proposed demolishing or restructuring of the wall between church and state, however, affords attractive options. Accommodation would breed results no more principled than those which are obtained now, albeit perhaps in a less convoluted way.<sup>18</sup> Rehnquist's notions reflect a reading of history that is at best selective, at worst disingenuous, and in either event flawed.<sup>19</sup>

The guarantee against enactment of laws "respecting an establishment of religion"<sup>20</sup> was formulated to ensure that the republic would not fractionate and founder upon religious differences. Too frequently, it is difficult to discern how establishment clause review meaningfully pertains to the proposition's reason for existence. Reasoning and conclusions, moreover, routinely seem oblivious to or heedless of the link between the establishment clause and cultural pluralism. At least three justices are on record in favor of reexamining existing standards<sup>21</sup> and one justice has sharply criticized the operation of these standards at least in part.<sup>22</sup> Because the future of the three-part test seems increasingly unsettled, consideration of potential doctrinal alternatives is especially timely. The purpose of this Article is to: (1) delineate the woeful nature of modern establishment clause thinking; (2) explain why alternative analytical methodologies that the Court is experimenting with or pondering are at least as unattractive; and (3) identify some focal points that might

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12. See *infra* notes 73-92 and accompanying text.

13. See *infra* notes 93-97 and accompanying text.

14. *Marsh v. Chambers*, 463 U.S. 783 (1983).

15. Thus, the Court observed that a municipality's nativity scene has principally taken note of a significant historical religious event long celebrated in the Western World. *Lynch v. Donnelly*, 465 U.S. 668, 676-78, 686 (1984).

16. *Wallace v. Jaffree*, 472 U.S. 38, 92-107 (1985) (Rehnquist, J., dissenting).

17. *Id.* at 113.

18. See *infra* notes 101-22 and accompanying text.

19. See *infra* notes 123-51 and accompanying text.

20. U.S. CONST. amend. I.

21. See *Wallace v. Jaffree*, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring in judgment); *id.* at 91 (White, J., dissenting); *id.* at 107 (Rehnquist, J., dissenting).

22. See *Edwards v. Aguillard*, 107 S. Ct. 2573, 2593 (1987) (Scalia, J., dissenting).

contribute to more principled and meaningful review better attuned to the needs of cultural pluralism and thus the broader interests and values of the first amendment.

## II. THE AMAZING DISGRACE OF THE ESTABLISHMENT CLAUSE

The Court's first significant effort to chart the contours of the establishment clause was a harbinger of future calamity. In *Everson v. Board of Education*,<sup>23</sup> the Court considered a constitutional challenge to transportation reimbursements for parents of children in public and parochial schools.<sup>24</sup> Justice Black, after examining early American concerns that prompted the framing, adoption, and ratification of the establishment clause, concluded that the first amendment

means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>25</sup>

The cogency of Black's explication was embraced by the entire Court. Four justices dissented from the judgment upholding the subsidy scheme, however, on grounds that approval deviated from the Court's stringent characterization of the first amendment.<sup>26</sup> A sense that strict separation of church and state was merely being mouthed moved Justice Jackson to observe that "the case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent'—consented.'"<sup>27</sup> The Court's first accession was not its last, although future oscillations between consent and demurral moved beyond a singular fall from doctrinal purity into what has become a prolonged wallowing in disrepute.

Most decisions implicating the establishment clause have concerned government assistance to parochial schools. In addition to allowing state reimbursement of student transportation expenses,<sup>28</sup> the Court has countenanced textbook loans,<sup>29</sup> tax deductions for educational costs,<sup>30</sup> government funding of standardized testing,<sup>31</sup> subsidized physical and psychological diagnostic services and counseling,<sup>32</sup> and publicly

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23. 330 U.S. 1 (1947).

24. *Id.* at 18.

25. *Id.* at 15–16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

26. *See id.* at 19 (Jackson, J., dissenting); *id.* at 46 (Rutledge, J., dissenting).

27. *Id.* at 19 (Jackson, J., dissenting).

28. *Id.*

29. *Board of Educ. v. Allen*, 392 U.S. 236, 245–48 (1968).

30. *Mueller v. Allen*, 463 U.S. 388, 403 (1983).

31. *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

32. *Wolman v. Walter*, 433 U.S. 229, 244, 248 (1977).

financed construction at sectarian colleges.<sup>33</sup> The Court has invalidated, however, loans of instructional materials to parochial schools,<sup>34</sup> government-provided field trip transportation,<sup>35</sup> tax credits for educational costs,<sup>36</sup> teacher salary supplements,<sup>37</sup> reimbursement for non-standardized testing,<sup>38</sup> and special educational programs for students and adults.<sup>39</sup>

Other significant controversies have related to the presentation, promotion, or facilitation of religious theory or values in public schools, public deliberative bodies, the workplace, and on government property. Released time programs have been upheld to the extent religious education is provided off<sup>40</sup> but not on campus.<sup>41</sup> Official efforts to ban the theory of evolution from the schoolhouse,<sup>42</sup> or require instruction in creationism if evolution is taught,<sup>43</sup> have been invalidated. School prayer,<sup>44</sup> Bible readings,<sup>45</sup> and classroom religious displays have also been invalidated,<sup>46</sup> although a moment of silence that could be devoted to prayer at student discretion may be permissible.<sup>47</sup> The use of chaplains to lead prayer in legislative or other deliberative bodies,<sup>48</sup> Sunday blue laws,<sup>49</sup> and government subsidized nativity scenes<sup>50</sup> have withstood establishment clause scrutiny, but legislation affording employees a right not to work on their chosen day of worship has not.<sup>51</sup>

The variable results in the establishment clause cases reflect more finesse than congruity of thought. Dissenting opinions alternately shriek allegations that the Court has substituted subjective preferences for settled establishment clause principles<sup>52</sup> or that the Court has taken those precepts too far.<sup>53</sup> The vacillations and inconsistencies responsible for the sorry state of establishment clause review have been well-documented from a macrocosmic perspective.<sup>54</sup> The fickle nature of the Court's analysis is even more graphic when the operation of its standards are examined from a microcosmic viewpoint. The recent case of *Bowen v. Kendrick*<sup>55</sup> is a prominent

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33. *Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736, 766-67 (1976); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971).

34. *Wolman*, 433 U.S. at 251.

35. *Id.* at 254-55.

36. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 797-98 (1973).

37. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

38. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 482 (1980).

39. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 397-98 (1985).

40. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

41. *McCullum v. Board of Educ.*, 333 U.S. 203, 212 (1948).

42. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

43. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2584 (1987).

44. *Engel v. Vitale*, 370 U.S. 421, 433 (1962).

45. *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

46. *Stone v. Graham*, 449 U.S. 39, 42-43 (1980).

47. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

48. *Marsh v. Chambers*, 463 U.S. 783 (1983).

49. *McGowan v. Maryland*, 366 U.S. 420, 425-28 (1961).

50. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

51. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985).

52. *See, e.g., Marsh*, 463 U.S. at 813-18 (Brennan, J., dissenting).

53. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 106-12 (1985) (Rehnquist, J., dissenting).

54. *See, e.g., Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

55. 108 S. Ct. 2562 (1988).

example of how establishment clause review is a labyrinth characterized by multiple exit points.

In the *Kendrick* case, the Court determined that federal funding of religious organizations which counseled teenagers against premarital sex and abortion,<sup>56</sup> at least on its face, did not breach the establishment clause.<sup>57</sup> Since its enactment in 1981, the Adolescent Family Life Act ("AFLA")<sup>58</sup> has allocated more than \$100 million to religious groups including Roman Catholic agencies.<sup>59</sup> Despite arguments and trial court findings that the AFLA underwrote religious indoctrination,<sup>60</sup> the Court found no violation of the three-part test for an establishment clause violation.<sup>61</sup>

Like many establishment clause decisions, the *Kendrick* opinion illustrates the futility of motive-based inquiry. Even if religious reasons motivated some legislators to support the AFLA, an ample array of secular reasons could be articulated to obscure wrongful intent.<sup>62</sup> The need to discern official intent is as troubling a dimension of establishment clause thinking as it is in other areas of constitutional law. Wrongful intent, for instance, is a prerequisite for demonstrating not just an establishment clause violation,<sup>63</sup> but also for proving a claim of race or gender discrimination.<sup>64</sup> The Court's pursuit of motive-based inquiry is not only treacherous, but mystifying, given its acknowledgement of the perils of such analysis. In freedom of speech cases, the Court has refused to assess official motive<sup>65</sup> because such intent is so elusive.<sup>66</sup> Especially because the rationales of individual legislators may diverge even when their votes are identical, the Court concluded, in *United States v. O'Brien*,<sup>67</sup> that "stakes are sufficiently high for us to eschew guesswork" when first amendment interests are implicated.<sup>68</sup>

Given recognition of the dangers and deficiencies of motive-based inquiry, the Court's selective subscription to it is inexplicable. It is disquieting, moreover, to the extent that such a burdensome standard favors majoritarian interests and encumbers vindication of minority concerns and cultural pluralism. Rightfully so, the need to identify wrongful intent to establish race or sex discrimination has been extensively and effectively criticized.<sup>69</sup>

Concern with impeding the functions of the legislative branch, even if arguably valid in equal protection settings where any classification having a disparate racial or

56. *Id.* at 2566-68 & nn. 1-3.

57. *Id.* at 2579.

58. 42 U.S.C. §§ 300Z-300Z-10 (1982 & Supp. IV 1986).

59. See Christian Sci. Monitor, June 30, 1988, at 40, col. 2.

60. *Kendrick*, 108 S. Ct. at 2568.

61. *Id.* at 2570-79.

62. See *infra* notes 65-68, 71-72, 142-44 and accompanying text.

63. See *Kendrick*, 108 S. Ct. at 2579.

64. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

65. See *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

66. See *id.*

67. 391 U.S. 367 (1968).

68. *Id.* at 384.

69. See, e.g., Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

gender impact may be problematical,<sup>70</sup> is less persuasive when considering the issue of church and state relationships. The inaptness of motive-based inquiry in the establishment clause context has been effectively noted by Justice Scalia. Reciting many of the same criticisms directed toward modern equal protection analysis, Scalia notes that identification of motive is an "almost . . . impossible task."<sup>71</sup>

The number of possible motivations to begin with, is not binary, or indeed even finite . . . [A] particular legislator need not have voted for [a law] either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted 'yes' instead of 'no' or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.<sup>72</sup>

Motive-based inquiry—as the Court recognized in *O'Brien*, Justice Scalia has observed, and critics of equal protection thinking have emphasized—is an unprofitable constitutional exercise.

Straightforward application of an effect test would make the establishment clause a virtually impenetrable barrier. Absent government assistance, for instance, religious institutions would have to underwrite programs entirely on their own, and some parents would be priced out of a private school option for their children. Invariably, government subsidization and services free religious funds and energies to advance sectarian purposes, enables sectarian organizations to redirect limited funds to programs that directly advance their mission, and facilitates the accessibility of religious activities and enterprises to the public. The Court has refrained from constructing an uncompromising effect test. Instead, the Court has considered the primary effect of government action<sup>73</sup> and, at times, has transformed the inquiry into an assessment of whether the state might be perceived as endorsing religion.<sup>74</sup>

Even pursuant to a diluted standard, the Court in the *Kendrick* case professed difficulty in discerning "whether the primary effect of the challenged statute is impermissible."<sup>75</sup> The Court then drew a not so obvious parallel to cases tending to

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70. The prevailing concern is that a solitary focus upon discriminatory effect would endanger so many enactments that the legislative process would be hostage to equal protection dogma. See *Washington v. Davis*, 426 U.S. 229, 249 n. 14 (1976).

71. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2605 (1987) (Scalia, J., dissenting).

72. *Id.* at 2605–06 (Scalia, J., dissenting) (emphasis in original).

73. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2571 (1988).

74. See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984).

75. *Kendrick*, 108 S. Ct. at 2571.

discount concern over unlawful effect. The Court relied heavily on college funding cases, which focus on the diminished religious emphasis of tertiary institutions and intellectual maturity of students,<sup>76</sup> and determined that AFLA assistance was comparable to such financing.<sup>77</sup> The chosen analogy is problematical to the extent ample and even more persuasive precedent exists for a contrary result. Insofar as aid recipients have editorial control over information they disseminate pursuant to public funding, the Court normally has found an impermissible effect of advancing religion. Although provision of secular textbooks<sup>78</sup> or administration of state-prepared examinations<sup>79</sup> has been permitted, funding for instructional materials<sup>80</sup> or tests<sup>81</sup> prepared by sectarian schools have been disallowed. To the extent aid is channeled to religious agencies propounding theological messages on human reproduction and related matters,<sup>82</sup> case law provides clear reference points for an establishment clause violation.

Characterizations of religious colleges, as being not "pervasively sectarian"<sup>83</sup> and having students who "are less impressionable and less susceptible to religious indoctrination,"<sup>84</sup> were critical for allowing support that would not have been countenanced at the secondary level. It is puzzling, therefore, that the Court found religious counseling services to young adolescents more akin to the college rather than primary or secondary school line of cases.<sup>85</sup> The AFLA unquestionably enables religious authorities to select counselors and curricula for the purpose of influencing impressionable young minds on matters of religious dogma.<sup>86</sup> A highly defensible conclusion, contrary to the Court's, could rest upon the realization that "[t]ime and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make 'a total separation between secular teaching and religious doctrine.'"<sup>87</sup> Strong precedent exists for a conclusion that government action may be unconstitutional, whether or not it actually promotes religion, so long as it presents a significant risk of doing so.<sup>88</sup>

The dubious nature of the Court's analysis is compounded further by the nature of the activity being subsidized. Although it may be permissible to have a cleric perform a secular function,<sup>89</sup> "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to

76. See *id.* at 2575.

77. *Id.*

78. See *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968).

79. See *Wolman v. Walter*, 433 U.S. 229, 240-41 (1977).

80. See *id.* at 250-51.

81. See *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 480 (1973).

82. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2587-88 n.7 (1988) (Blackmun, J., dissenting).

83. See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

84. Referring to those cases, Justice Blackmun in dissent noted that "[t]he skepticism of the college student is not an inconsiderable barrier to any attempt to subvert the congressional objectives and limitations." *Kendrick*, 108 S. Ct. at 2589-90 (quoting *Tilton*, 403 U.S. at 686).

85. *Kendrick*, 108 S. Ct. at 2589-90.

86. *Id.* at 2588-90 (Blackmun, J., dissenting).

87. *Id.* at 2589 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

88. *Id.* at 2594-95 (Brennan, J., dissenting).

89. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 746 (1976).

make the difficult decisions facing them.”<sup>90</sup> The latter circumstance, characterized by direct pedagogy, is fraught with considerably more risk of religious indoctrination.<sup>91</sup> The Court found it “sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life.”<sup>92</sup> The point perhaps most poignantly evinces how establishment clause thinking can disregard or miss the central constitutional premise forbidding government from underwriting such influence.

Just as easily as the AFLA can be found to have the primary effect of advancing religion, it may be determined that the program invites an unacceptable degree of government entanglement. In determining whether entanglement may be excessive, relevant considerations have included the type of assistance, the nature and purposes of aid recipients, and the consequent relationship between the state and beneficiary.<sup>93</sup> Insofar as it was possible to fund discrete secular functions of a college or university, and no extensive auditing or persistent monitoring of the grantee’s activities was necessary, the Court upheld such assistance.<sup>94</sup> Allocation of funds to religious agencies engaged in counseling and instruction, however, requires more than the minimal review necessary to ensure that buildings are devoted to secular purposes.<sup>95</sup> At a minimum, given the educative function of such organizations, disagreements would seem inevitable with respect to what constitutes a religious message.<sup>96</sup> As with instructional materials prepared by a religious school, the state’s editorial review function would be a highly intrusive one.<sup>97</sup> Again, therefore, ample and compelling authority exists for a decision contrary to the one reached by the Court.

One of the most troubling aspects of the excessive entanglement test is the Court’s recognition of its functional inadequacy but abiding reliance upon it. Supervision of funding is essential to ensure that government aid does not promote religion. Monitoring, however, amounts to entanglement that must be especially vigilant when impressionable adolescents may be exposed to religious indoctrination. Although the entanglement standard thus operates in conditions that undercut its viability if not straightforwardly applied, the Court persists in its utilization. Combined with the purpose and effect standards, it leaves the Court vulnerable to suspicion that it may be concerned more with convenient than principled results.

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90. *Kendrick*, 108 S. Ct. 2562, 2591 (1988) (Blackmun, J., dissenting).

91. “For some religious organizations, the answer to a teenager’s question ‘Why shouldn’t I have an abortion’ or ‘Why shouldn’t I use barrier contraceptives?’ will undoubtedly be different from an answer based solely on secular considerations.” *Id.*

92. *Id.* at 2573.

93. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 614–15 (1971).

94. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 688 (1971).

95. Because religious counselors are not doctrinally neutral, enhanced monitoring procedures would be required to ensure that assistance does not underwrite religious instruction. *See id.* at 687–88.

96. *See Kendrick*, 108 S. Ct. at 2591.

97. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 236–38 (1977); *Meek v. Pittenger*, 421 U.S. 349, 359–62 (1975).



## III. NEW DOGMA AND FALSE PROPHECIES

Despite the patent inadequacies of contemporary establishment clause analysis, the Court largely remains addicted to its treacheries. Although the Court describes the three-part test as merely a useful guide rather than as a fixed standard,<sup>98</sup> it seldom, if ever, has deviated from it.<sup>99</sup> The abysmal state of establishment clause review notwithstanding, doctrinal alternatives advanced so far are no more appealing. Former Chief Justice Burger's "accommodation" focus, which has been test-marketed in at least two instances,<sup>100</sup> and Chief Justice Rehnquist's revisionist notions regarding the wall between church and state, suffer respectively from flawed execution and conception. Moreover, neither alternative affords reason for optimism that it would forge a solid link now missing between establishment clause values and establishment clause judgment.

The accommodation principle first emerged as a basis for upholding a state legislature's practice of opening each session with a prayer by a state-paid chaplain.<sup>101</sup> The Court, in *Marsh v. Chambers*,<sup>102</sup> concluded that such invocations were "simply a tolerable acknowledgement of beliefs widely held among the people of this country."<sup>103</sup> Had the traditional three-part test been rigorously applied, as Justice Brennan and others have noted, the practice could not have survived.<sup>104</sup> Instead of firmly applying the purpose, effect, and entanglement standards, the Court considered the well-established use and traditional acceptance of legislative prayer.<sup>105</sup> Given what it perceived to be a historically well-rooted exercise, the Court concluded that an otherwise constitutionally vulnerable custom was permissible.<sup>106</sup>

Historical inquiry is a relevant consideration in determining the scope and meaning of any fundamental guarantee. As Chief Justice Rehnquist has observed in challenging prevailing establishment clause wisdom, however, "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."<sup>107</sup> Historical reference points used to support accommodation, if not entirely inaccurate, at least omit material parts of the record. James Madison, who, as chief architect of the establishment clause, is routinely adverted to in connection with any proposed theory of review,<sup>108</sup> considered directly whether "appointment of Chaplains to the two houses of Congress [is] consistent with the Constitution, and

98. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

99. The Court has asserted that the test was not "relevant" or "useful" in two cases. *Id.* In fact, the Court applied it as an alternative, if not the traditional standard of review, in one of those cases. See *Larson v. Valente*, 456 U.S. 228, 251-53 (1982).

100. See *infra* notes 101-03 and accompanying text.

101. *Marsh v. Chambers*, 463 U.S. 783, 784 (1983).

102. 463 U.S. 783 (1983).

103. *Id.* at 792.

104. *Id.* at 796 (Brennan, J., dissenting).

105. The Court noted that "[t]he opening of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.* at 786.

106. *Id.* at 793.

107. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

108. See, e.g., *id.*

with the pure principles of religious freedom.”<sup>109</sup> Responding precisely to the issue confronted by the Court in the *Marsh* case, Madison concluded that “[i]n strictness the answer on both points must be in the negative . . . . The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and those are to be paid out of the national taxes.”<sup>110</sup>

Madison’s observations contribute to a record which, when considered more broadly, offers less than unqualified support for legislative prayer. Selective interpretation is a danger of any historical probing and, because it is so easily identified and controverted, subverts the very doctrine that it begets. Adherence to custom and tradition alone is a dubious basis, moreover, upon which to rest constitutional judgment. The existence and legacy of slavery and segregation testify to the potential treachery of such reference points when employed as a substitute for more dynamic reasoning.<sup>111</sup> Selective and heavy emphasis upon convention is doubly disquieting, given the first amendment’s general concern for protecting diverse sentiments and sensitivities against dominant assumptions and practices.<sup>112</sup>

Despite the divergent instructions of history and perils of charting first amendment perimeters consonant with majoritarian inclinations, the Court has moved ahead with such analysis. Soon after approving legislative prayer, the Court evaluated a government-sponsored nativity scene in light of “an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”<sup>113</sup> In *Lynch v. Donnelly*,<sup>114</sup> the Court upheld a municipality’s subsidization and maintenance of the display.<sup>115</sup> The Court’s historical claims, however, were even less pertinent and compelling than in the *Marsh* case. The Court noted President Washington’s and Congress’ declaration of Thanksgiving as a national holiday, the presence of chaplains in the military, displays of religious art in public art galleries, and presidential and congressional proclamations on behalf of religious groups.<sup>116</sup> Although offered as “evidence of accommodation of all faiths,”<sup>117</sup> the Court’s recitation, unlike with legislative prayer, did not include an established record of the contested practice. Resort to analogy trivialized the creche to the level of a mere art exhibit and engendered a weak judgment.

Compelling reasons exist for abandoning present establishment clause precepts,<sup>118</sup> but accommodation concepts should not be looked to as a replacement standard of general utility. As employed so far, it is poorly calibrated toward the

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109. A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 346–47 (1964).

110. *Id.*

111. Both slavery and official segregation were justified by reference to “established usages, customs and traditions.” *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896). See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407–08 (1857).

112. See *infra* notes 120–22, 160–61 and accompanying text.

113. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

114. 465 U.S. 668 (1984).

115. *Id.* at 671, 687.

116. *Id.* at 676–77.

117. *Id.* at 677–78.

118. See *supra* notes 56–97 and accompanying text; *infra* notes 152–54 and accompanying text.

concerns of religious pluralism that are central to the establishment clause. In concluding that the "display of the creche [was] no more an advancement or endorsement of religion [than] . . . the exhibition . . . of religious paintings in governmentally supported [museums],"<sup>119</sup> the Court revealed the difficulty of determining where accommodation ends and endorsement begins. It also evinced a state of mind akin to the "acute ethnocentric myopia" that sometimes diminishes its sensitivity toward the nation's pluralistic fabric.<sup>120</sup> An "inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court,"<sup>121</sup> for instance, has accounted for a difficulty in discerning constitutional value in expression it finds offensive. Depiction of a creche as a traditional and essentially secular element of a holiday celebration demonstrates no acuity for how a nativity scene might be offensive for those whose religious heritage, if any, is not Christian or the object of government lavishness or attention. Review that fails to comprehend how minority interests may be affronted by such majoritarian insensitivity is at least as "depressing" as judgment reflecting a dominant culture's distaste for minority inclinations or ways.<sup>122</sup>

Although accommodation principles so far have only augmented the traditional purpose, effect, and entanglement test, Chief Justice Rehnquist proposes a radical conceptual overhaul that would entirely displace it. Rehnquist asserts that the metaphorical "wall of separation between church and state,"<sup>123</sup> to which the Court has referred for over a century,<sup>124</sup> is a "misguided analytical concept."<sup>125</sup> Rehnquist would abandon the partition imagery altogether and declare that the first amendment prohibits only the establishment of a national religion and perhaps discrimination among denominations.<sup>126</sup> Because that interpretation would not require government neutrality between religion and irreligion,<sup>127</sup> government would be free to aid all sects evenhandedly.<sup>128</sup>

The Rehnquist formula, if embraced by the Court, would alter dramatically the pertinent constitutional landscape. Government aid to parochial schools, for instance, would be permissible regardless of its potential for political divisiveness.<sup>129</sup> Although

119. *Lynch*, 465 U.S. at 683.

120. *FCC v. Pacifica Foundation*, 438 U.S. 726, 776-77 (1978) (Brennan, J., dissenting). The opinion in *Pacifica* was criticized for, among other things, attaching less first amendment value to expression that, although offensive to some Justices, was "the stuff of everyday conversation in some, if not many, of the innumerable subcultures that comprise this Nation." *Id.*

121. *Id.*

122. *Id.*

123. *Wallace v. Jaffree*, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting).

124. More than a century ago, the Court observed that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

125. *Wallace*, 472 U.S. at 106. Rehnquist asserts that the notion "illustrates all too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.* at 107 (quoting *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926)).

126. *Wallace*, 472 U.S. at 113.

127. *See id.*

128. *See id.*

129. Although rejecting the potential for political divisiveness as a general focal point, see *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984), the Court has considered it pertinent when direct financial subsidies of religious activities are at issue. *See Mueller v. Allen*, 463 U.S. 388, 403-04 n. 11 (1983).

not expressly stated in Rehnquist's authoring of the *Kendrick* opinion, a sense that the danger of a national religion was not created and neutrality was not compromised may have made it easier to dismiss seemingly difficult effect and entanglement problems.<sup>130</sup> Absent similar concern, prayer that did not favor a particular sect would be countenanced even if the consequence of overt legislative purpose.<sup>131</sup> Presumably, a nativity scene would be constitutional, subject arguably to other religions being afforded a comparable opportunity to have their heritage displayed.<sup>132</sup>

Rehnquist's revisionist notions represent the outgrowth of an equally revisionist reading of history. His conclusions flow from an assault upon Thomas Jefferson's "wall of separation" metaphor, which he discounts as a minor afterthought communicated to a church congregation fourteen years after the first amendment was framed.<sup>133</sup> Because Jefferson was in France when the Bill of Rights was being devised, Rehnquist further dismisses him as a "less than ideal source of contemporary history as to the meaning of the Establishment Clause."<sup>134</sup> Having deprecated Jefferson's contributions, the Chief Justice turns to James Madison whom he characterizes as having been the key draftsman and having had a different constitutional purpose in mind.<sup>135</sup> Based upon Madison's compositions, revisions, and House Service in 1789, Rehnquist asserts that the first amendment merely prohibits establishment of a national religion and perhaps sectarian discrimination.<sup>136</sup>

The exclusive focus upon Madison is troublesome because interpretations of his drafting designs, influenced by the need to elicit broad-based support for his work, are not indisputable. Reliance upon one authority, even if it is a prominent one, presumes that Madison's views were consensually subscribed to and thus makes an elementary mistake common in efforts to discern original intent. Identification of a singular understanding of or design for the establishment clause is as illusory an exercise as fathoming the collective intent of any deliberative body.<sup>137</sup> Delegates to the Constitutional Convention, like the states which ratified the first amendment, supported the establishment clause for diverse reasons. Some delegates and states saw it as a means for protecting established state religions against federal interference.<sup>138</sup> A few supported the provision as a mechanism for ensuring religious tolerance.<sup>139</sup>

130. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2573 (1988).

131. From the premise that the establishment clause does not require neutrality between religion and irreligion, Rehnquist concluded that "[n]othing in . . . the First Amendment, properly understood, prohibits [the state's] general 'endorsement' or prayer." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985).

132. Such a conclusion would transcend the Court's determination, on free speech grounds, that a religious group may not be denied access to a forum generally available to the public. *Widmar v. Vincent*, 454 U.S. 263, 281 (1981).

133. *Wallace*, 472 U.S. at 92.

134. *Id.*

135. *Id.*

136. *Id.* at 113.

137. See *supra* notes 62-72 and accompanying text; *infra* notes 142-44 and accompanying text.

138. South Carolina, Massachusetts, Connecticut, Maryland, and New Hampshire all had established churches which, when the first amendment was adopted, they wished to protect from federal interference. See I A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 559 (1950).

139. Colonial Pennsylvania was founded upon the notion that ethnic and religious diversity was desirable. See R. DIVINE, T. BREEN, G. FREDERICKSON & R. WILLIAMS, *AMERICA PAST AND PRESENT* 54-55 (1987). Even so, rights and liberties were restricted to those professing faith in a Christian religion. See *id.* at 55. Although the Pennsylvania model

Still other states favored it as a device that would keep government and religious affairs separate.<sup>140</sup> Madison and Jefferson were veteran champions of the separatist movement. Shortly before the Constitutional Convention, they had composed Virginia's guarantee of church and state separation, which emphatically prohibited government subsidization of religious activity.<sup>141</sup> Such separatist works are more consonant with establishing and maintaining than tearing down a wall between church and state. Public financing of religious activities, which Rehnquist would permit on a nondiscriminatory basis, is precisely what Madison sought to preclude in Virginia. Even if Jefferson was not a direct participant in the Constitutional Convention, and Madison harbored or accommodated some divergent views there, separatist thought was well represented and should not be selectively disregarded two centuries later.

Strangely enough, Rehnquist himself has acknowledged the deficiencies of motive-based inquiry. The Chief Justice has noted the futility of discerning a single "actual purpose"<sup>142</sup> and has even criticized the Court for failing to recognize that legislators support a given bill for varying reasons.<sup>143</sup> He once posed the rhetorical question of how the Court should identify the actual purpose of a regulation, adopted by a 40-20 vote, and supported by ten legislators on safety grounds and by ten others on the basis of protectionism.<sup>144</sup> The unstated but obvious answer was that collective intent was not just indecipherable but nonexistent. Confronted with a similar question of how to ascertain the actual purpose of the establishment clause, however, Rehnquist seems satisfied with the abridged commentary of one source.<sup>145</sup>

Although Madison may have been the principal author of the first amendment, he did not ratify it alone. Even if he had, the characterization of Madison's substantive sentiments are not incontrovertible. References to Madison's early writings and actions in the House disregard subsequent reformulation of thought and confessions of error. In acknowledging that his initial approval of House chaplains was mistaken, Madison asserted that "[i]f Religion consists in voluntary acts of individuals, singly or voluntarily associated, and [if] it be proper that public functionaries, as well as their constituents should discharge their duties, but let them like their constituents, do so at their own expense."<sup>146</sup> Later, as president, Madison vetoed a land grant to a church because it "comprise[d] a principle and precedent for the appropriation of funds of the United States, for the use and support of religious

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comes closest to supporting an establishment clause theory that precludes only denominational discrimination, it in fact favored Christianity over other religions. *See id.*

140. Madison and Jefferson strongly opposed intermingling of government and religious affairs and successfully advocated the Virginia Statute of Religious Liberty of 1786. *See* 2 THE WRITINGS OF THOMAS JEFFERSON 300-03 (A. Bergh ed. 1905). The Act was a strong separatist work designed especially to preclude public funding of religious activity. *See id.*

141. *See id.*

142. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 702-03 (1981) (Rehnquist, J., dissenting) (Rehnquist notes that motive-based inquiry consistently has been rejected by the Court in other contexts and should not be used in dormant commerce power analysis).

143. *Id.*

144. *Id.* at 703.

145. *See* *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985).

146. I A. STOKES, *supra* note 138.

societies contrary to the establishment clause."<sup>147</sup> He also spoke forcefully against employment of "Religion [generally] as an engine of Civil Policy."<sup>148</sup>

Such remonstrances are improbable antecedents for wholesale discounting of pluralistic concerns associated with conclusions that the establishment clause merely prohibits imposition of an official religion and possibly sectarian discrimination. They speak much more strongly toward reinforcement rather than leveling of the wall between church and state. Although some of Madison's most trenchant observations may reflect afterthought and hindsight, those are significant benefits which enlightened review should not discount or dismiss. Inquiries into original meaning would be retarded if allowed to consider only the theoretical expectations and not the practical observations of the framers.

Constitutional interests are not well served when principle emerges primarily from a competition among favorite versions of history. Searches for original intent run a significant risk of devolving into identification of the most serviceable purpose. Emphasis upon the aims of one framer, or even of the entire assemblage of constitutional architects, also risks investment in a manifestly imperfect body<sup>149</sup> and guesswork, while discounting the ability of subsequent generations to engage in a critical aspect of self-governance. Setting contemporary establishment clause standards in accordance with pre-ratification contemplations is akin to tying modern equal protection precepts to expectations of the fourteenth amendment's framers, who did not anticipate abolition of segregation.

To the extent early wisdom and perceptions are relevant, full disclosure of them requires reference to the history of Article VI of the Constitution. That provision prohibits any "religious test [from being] . . . required as a qualification to any office or public trust under the United States."<sup>150</sup> Although not affording the capacious religious guarantees of the first amendment, Article VI is noteworthy for revealing a contemporaneous state of mind that was sensitive to irreligion and is omitted from Rehnquist's historical narrative.

Heavy or exclusive emphasis upon framers' intent also obscures or disregards the reality that significant constitutional values and law have evolved from experience rather than original contemplation. Whatever instructions are afforded by the drafting and ratification of the establishment clause have been augmented, over the course of time, by the lesson that a diverse society remains pluralistically viable only if it honors its diversity.<sup>151</sup> Appreciation of that reality is essential toward ensuring that a

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147. 22 ANNALS OF CONGRESS 1098 (1811).

148. 8 THE PAPERS OF JAMES MADISON 301-02 (1973).

149. Many of the fourteenth amendment's architects, for instance, considered liberty of contract as the key to equal protection and in no way contemplated desegregation. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 46 (1985). Original imperfection is evidenced by, among other things, irresoluteness in addressing the slavery issue.

150. U.S. CONST. art. VI.

151. Comprehensive neutrality reflects:

recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.

*Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). A similar sensitivity to the need to read the establishment clause in light of a pluralistic society is evident in the Court's expansion of statutory grounds for conscientious objector

person's standing in the political community is unaffected by his or her religiosity or lack thereof. If not indubitably prescribed by the works of Madison or others, the continued factoring of irreligion concerns into establishment clause review is consistent with respect for a culturally pluralistic order.

#### IV. CULTURAL PLURALISM AND THE PATH TOWARD CONSTITUTIONAL REDEMPTION

It is unrealistic to expect any constitutional standard to beget results that are immune to controversy or criticism. The failings of the purpose, effect, and entanglement test, however, are well beyond normal margins of tolerance. Existing criteria have bred incurably fractured plurality opinions and proved inadequate for deciding issues in a principled fashion.<sup>152</sup> It is an accurate observation that the "wall of separation" has deteriorated into a "blurred, indistinct, and variable barrier" that is only "dimly perceived."<sup>153</sup> That degeneration, however, is less a justification for total destruction than a justification for rehabilitation. The wall has decayed, not because it lacks structural integrity, but primarily from neglect. Establishment clause standards do not always bear a visible relationship to establishment clause values and are poorly conceived for maintenance purposes. The purpose element, in particular, seems little more than an impertinent jurisprudential import with minimal utility in any first amendment zone.<sup>154</sup> Ultimate responsibility for analytical mischief and inconsistent division of government and religious affairs rests with the Court which, even when setting pertinent standards, has evinced a failure of will or lack of sensitivity in applying them. The wall between church and state consequently has been eroded by majoritarianism and subjectivism into its present disreputable state as a semi-permeable barrier that is vulnerable to dominant and orthodox impulses.

Proposals to tear down the wall altogether and thereby remove it permanently from the first amendment's lexicon coincide with suggestions that the concerns which originally prompted the establishment clause largely have dissipated.<sup>155</sup> Such intimations seem seriously detached from contemporary political realities which are characterized by notable actual and potential insinuations of religion into government and vice-versa. Modern touching of establishment clause nerves include a major political party's resolution declaring the United States "a Christian nation"<sup>156</sup> and moral controversies such as abortion that mix heavy doses of religion and politics.<sup>157</sup> Evangelism inspired a prominent candidacy in the most recent presidential primaries and has channeled its energies into organizing and maintaining powerful political

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status so that they included not only religious but political, sociological, philosophical, and moral beliefs. See *Welsh v. United States*, 398 U.S. 333, 342-44 (1970).

152. *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

153. *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

154. See *supra* notes 62-72 and accompanying text.

155. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 629 (1978); *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring).

156. *Newsweek*, Feb. 27, 1989, at 5, col. 4 (resolution by Arizona Republican Party).

157. An argument that federal restrictions upon publicly funded abortions violated the establishment clause, because they advanced church policies, was rejected by the Court in *Harris v. McRae*, 448 U.S. 297 (1980). The Court determined that the relationship between church and state policy was merely coincidental. *Id.* at 319-20.

lobbies. Religious activism comes at a time when the political system is increasingly susceptible to the importunes of special interest groups.<sup>158</sup> The force and influence of political action committees, whose concerns transcend the particularized interests of a given district, have disrupted traditional norms of electoral accountability. Such actualities and trends further militate toward fortification rather than demolition of the wall between church and state.

Improvement in establishment clause standards of review must proceed from an analytical departure point calibrated more carefully toward the overarching aims of the first amendment. The multiple but associated elements of that guarantee, encasing freedom of religion, press, speech, association,<sup>159</sup> and rights to assemble peaceably and petition for redress of grievances,<sup>160</sup> collectively represent society's valuation of individual dignity, conscience, and difference. A central premise of existing establishment clause review is that "[w]e are a religious people."<sup>161</sup> That calculation, however, too often steers analysis toward majoritarian preferences and orthodoxy and away from the interests of diversity. A better originating point, more visibly tied to pluralistic values, is that "we are a diverse people."

Abiding concerns for analysis that seeks to conform establishment clause principles with transcendent first amendment values are essentially twofold. Religion should be irrelevant to political standing and religious support or association should not be coerced. Proper attention to those interests does not require the total elimination of existing criteria for review. It necessitates a restructuring of those standards which are pertinent, however, and their integration with precepts that would fasten toward heterodox rather than orthodox sensitivity.

The possibility of excessive entanglement is a legitimate focal point of establishment clause review. Although it is the last of the elements to be incorporated into the existing three-part test,<sup>162</sup> it is probably the most relevant. Ensuring that the affairs of government and religion do not become ensnared serves pluralism in two ways. When government becomes insinuated in the propagation of a religious message or agenda, those who subscribe to another denomination or other religion may be affronted and belittled. Administrative entanglement makes creed vulnerable to official promptings and thus endangers religious autonomy and pluralism. In its present incarnation, the entanglement test has failed to confront satisfactorily the snarling of official action both with religious heritage and operations.

That remissness, as noted before, reflects dereliction both in doctrinal execution and linkage to pluralistic values. The *Kendrick*,<sup>163</sup> *Lynch*,<sup>164</sup> and *Chambers*<sup>165</sup> cases each presented major entanglement problems. Standards were relaxed, however, and

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158. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., concurring).

159. Freedom of association has been inferred from enumerated freedoms of speech and assembly. See *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

160. U.S. CONST., amend. I.

161. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

162. See *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970).

163. *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), discussed at *supra* notes 55-97 and accompanying text.

164. *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at *supra* notes 113-22 and accompanying text.

165. *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed at *supra* notes 101-12 and accompanying text.



diversity interests derogated. The funding of Catholic agencies providing advice to adolescents on abortion and pregnancy, as noted previously,<sup>166</sup> provides a classic problem of administrative entanglement. Official nativity exhibits and legislative prayer connote alignment of government with orthodox rather than pluralistic ideals.<sup>167</sup> It may be argued that such action benefits diversity, because it facilitates the free exercise of religion. Abetment of that nature, however, elevates and benefits the religious interests of only one segment of the citizenry. Official recusal would neither favor nor, because private expressions of faith would not be precluded, constitutionally burden anyone. At least when free exercise interests are not seriously immobilized, therefore, official noninvolvement would seem generally prudent.

Sometimes related to but nonetheless separate from entanglement is the possibility that government action may be politically divisive. The potential for discord is a highly probative consideration but a factor which the Court generally has shied away from examining. Given the especially close relationship between religious-political dissonance and the reason for the existence of the establishment clause, the Court's reluctance to examine divisive potential is mystifying. For the most part, it has brushed off the possibility of such an inquiry in conclusory terms.<sup>168</sup> Protestations that such an evaluation would be speculative,<sup>169</sup> or should be confined to instances of direct government funding,<sup>170</sup> disregard or undervalue its utility. They also forget that the Court routinely engages in much more conjectural exercises, sometimes even to curtail rather than enhance or vindicate constitutional interests.<sup>171</sup> The pursuit of motive-based inquiry is an especially prominent exercise in speculation and vanity, which already infects establishment clause analysis and is central to equal protection<sup>172</sup> and state police power review.<sup>173</sup>

Inquiry into potential divisiveness requires less speculation than sensitivity toward social reality and pluralistic values. Discernment of adverse consequences from government action is the analytical process responsible for determining, for instance, that official segregation was harmful and thus constitutionally intolerable.<sup>174</sup> As it did in examining laws that favored the majority race, the Court need only ascertain whether official ways or enactments convenience a dominant culture at the expense of a minority. Contrary professions notwithstanding, the Court is not incompetent or unpracticed with respect to identifying the divisive nature and consequence of government action and then factoring them into constitutional law. Such an analytical methodology would be incidentally useful in addressing some of

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166. See *supra* notes 93-97 and accompanying text.

167. See *supra* notes 119-22 and accompanying text.

168. See *Mueller v. Allen*, 463 U.S. 388, 403-04 n. 11 (1983).

169. See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

170. See *Mueller*, 463 U.S. at 403-04 n.11.

171. "From the beginning of civilized societies, legislators and judges have acted on various comprovable assumptions." *Paris Adult Theater v. Slaton*, 413 U.S. 49, 61 (1973). Obscenity has been prohibited and first amendment freedom accordingly circumscribed, for instance, pursuant to the presumption that it is harmful. See generally *Paris Adult Theatre*, 413 U.S. at 49.

172. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

173. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 677 (1981).

174. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954).

Chief Justice Rehnquist's neutrality concerns,<sup>175</sup> but would account for them in a more pluralistically sensitive fashion. Sectarian discrimination<sup>176</sup> might present enough of a likelihood of dissonance, for instance, that such favoritism would constitute a presumptive first amendment violation.<sup>177</sup>

A hard focus upon entanglement and searching inquiry into divisive potential would not invariably negate every relationship between government and religion. Accommodation concepts might afford an analytical predicate for sensitively inquiring into societal values pertinent to shaping establishment clause parameters and avoiding wooden or unreasonable results. To function properly and effectively, however, such notions must advance pluralistic values rather than swallow them. When government is responsible for a burden that otherwise would be imposed on the free exercise of religion, accommodation is a pertinent recourse. It satisfactorily justifies, for instance, official provision of military chaplains. Because of their unique relationship with the state, and consequent problems of religious access resulting from location and service, military personnel might be denied access to organized religion unless the government affirmatively afforded the opportunity.<sup>178</sup> Notions of accommodation also are at the core of constitutional respect for personal conscience that may conflict with officially imposed obligations.<sup>179</sup>

Accommodation thus may be a serviceable principle when government action or expectations would impair religious exercise or burden belief. It would not support school prayer, official religious displays, or any other practice that is or should be subject to constitutional rather than governmental disability. Regardless of any establishment clause prohibition of such exercises, individuals are not impaired with respect to the capacity for prayer or profession on their own private terms. An interest in extending the opportunity, with the consequence that competing beliefs or nonbeliefs may be implicated or disadvantaged, is not congruent with or comparable to having an officially reduced opportunity for the exercise of faith. Accommodation may be used to remedy government-induced impediments, but should not be a device for facilitation in the absence of official responsibility for those circumstances.

The concept of accommodation thus is a principle of limited utility that is most useful when no potential exists for coerced or unwanted religious association. If the concept is to be stretched any further, its outer limits should not countenance practices without well-established historical support and unequivocal contemporary acquiescence. Legislative prayer might qualify pursuant to such an exception, given its well-established nature and if objections are truly unappreciable. Still, irreligion should merit enough respect in a pluralistic order to necessitate an inquiry into less burdensome alternatives. Consideration might run to pre-session invocations, a general moment of silence that facilitates pluralistic thought, and contemplation of

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175. See *supra* notes 126-27 and accompanying text.

176. Contrary to Rehnquist's notion that the state is prohibited only from sectarian discrimination, however, pluralism concerns militate against favoritism of religion or irreligion.

177. See generally *Larson v. Valente*, 456 U.S. 228, 248 (1982).

178. Compulsory chapel requirements, in contrast, would be coercive and thus unconstitutional. See *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

179. See generally *Welsh v. United States*, 398 U.S. 333 (1970).

other options that would enable consenting individuals to address their spiritual needs.

Also fitting within an exception to the common establishment clause rule might be religious references on coinage, which do not extract an individual endorsement. Compulsory pledges of allegiance to "one nation under God" or their equivalent, regardless of how supported by tradition, coerce rather than accommodate and accordingly should have no constitutional support.<sup>180</sup> Public schools do not have the longevity of legislatures or coinage.<sup>181</sup> They are not a fitting place for religion, in any event, because schools are well-established venues for conflict between official compulsion and individual autonomy.<sup>182</sup> Accommodation of free exercise interests may reflect a worthy governmental purpose, but not beyond a point at which it becomes discernible as coercion or begets conflict or disorder. When conceived essentially by majoritarian impulses, first amendment standards tend to be misbegotten. When used primarily to satisfy majoritarian expectations, first amendment interests are mismanaged.

## V. CONCLUSION

The Court often has lamented the difficulty of drawing necessary lines in the establishment clause area. The charting of constitutional contours generally, however, is a challenging exercise. It becomes more perilous when principle becomes visibly detached from underlying value. Modern establishment clause analysis at its worst fits into a jurisprudential legacy characterized by a dominant culture's impositions or insensitivities. The futility of contemporary establishment clause analysis was further evinced, as this article went to print, by the micromanagement of seasonal religious displays in *County of Allegheny v. ACLU*.<sup>183</sup> The Court approved exhibition of a menorah outside a city-county building, but disallowed a nativity scene on the inside.<sup>184</sup> The good news is that four justices appear to favor an overhaul of establishment clause standards.<sup>185</sup> The bad news is that they would veer further from the imperatives of cultural pluralism.<sup>186</sup> Constitutional life would be much simplified and the quality of review better enhanced if the establishment clause were more seriously and consistently regarded as an integrated thread in the first amendment's broad pluralistic weave.

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180. See *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

181. Public education is largely a phenomenon of the past century. See L. TRIBE, *supra* note 149.

182. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible readings and prayer); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (pledge of allegiance); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (restrictions on teaching foreign language).

183. 57 U.S.L.W. 5045 (U.S. July 3, 1989).

184. *Id.* at 5052-53, 5057.

185. *Id.* at 5067.

186. The revised focus would entail a majoritarian weighted consideration of whether government coerced support of or participation in religion or provided direct benefits that established or tended to establish a state religion. *Id.* at 5068 (Kennedy, J., dissenting).

